Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-545

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
	)	

Rate Regulation

COMMENTS

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INTRODUCTION

The purpose of these comments is to urge the Federal Communications Commission ("Commission") and interested parties to embrace arbitration as a mechanism for setting basic service tier rates within the context of the Cable Television Consumer Protection and Competition Act 1992 ("Cable Act of 1992") and this proceeding. Arbitration is suggested here as a desirable means of satisfying the preference expressed by the Congress in enacting the Cable Act of 1992 for "reducing the administrative burden on subscribers, cable operators, franchising authorities and the Commission." This filing will have achieved its objective if cable operators, franchise authorities, and the Commission seriously consider the very real advantages of rate

arbitration as a helpful alternative dispute resolution ("ADR") mechanism for resolving cable rate cases.[1]

RATE ARBITRATION

Simply stated, rate arbitration is the process whereby cable rates are determined by an independent third party (typically a single individual or a panel of three). It entails an agreement (e.g., the franchise document or a separate understanding) between the cable operator and the franchise authority to substitute arbitration for (local) administrative rate-setting mechanisms. An agreement to arbitrate might also include the following:

(1) The size of the arbitration panel;

(2) How the arbitrators are selected (Each party usually selects one arbitrator and the two so chosen select the third);

(3) The timeframes (dates) for the arbitration, including deadlines for case presentations and arbitrators' review and decision;

(4) An acknowledgment that each party intends to be bound by the arbitrators' decision; and

(5) Who pays the expenses of arbitration? (Often, each party covers its own expenses and shares equally the arbitration costs.)

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[1] This Notice of Proposed Rulemaking ("NPRM") discusses ADR (at paragraph 168) in the context of leased access. It is suggested here that ADR has considerably broader applicability to the Cable Act of 1992; it may usefully be employed in rate setting, leased access cases, and many other Cable Act contexts.

The agreement would also include the standard to be applied by the arbitrators. For example, in the context of this proceeding, the arbitrators may be asked to determine which proposal will result in "reasonable" rates and may be instructed to apply the formula (be it "bench mark" or "cost-based", etc.) adopted by the Commission. Also, the agreement may outline the procedures for input by interested third parties in the arbitration.

URBAN ARBITRATION EXAMPLE

One major cable rate arbitration which was accomplished amicably and expeditiously, entailed what is called "last-offer" arbitration. Under last-offer arbitration, the arbitrator's function is to determine which of the competing sides' last offers is better calculated to reach the appropriate result, i.e., to meet the standard being applied.

In this case, three arbitrators were chosen; one was selected by each party and the third was selected by the other two arbitrators. Not surprisingly, the first two arbitrators were advocates and the third arbitrator was, in fact, the deciding influence.

The process went smoothly, especially in view of the extensive public debate and threats of litigation which preceded the decision to arbitrate. It was professional; it was low key; and it was relatively quick and inexpensive for both sides.

COMPATIBILITY WITH CABLE ACT

The question arises as to whether third-party arbitration (or other ADR approaches such as mediation) is

compatible with the 1992 Cable Act. That is, is there anything in the statute which would prohibit rate arbitration?

While it is not entirely clear, the common-sense answer is that there should not be any such prohibition. If the parties are amenable to resolving the rate issue through arbitration, it seems illogical to require a different approach. And, while empowering franchising authorities to regulate "basic" rates in the absence of effective competition, the 1992 Act neither requires them to do so nor does it preclude them from relying upon arbitration.

The legislative history of the '92 Act certainly supports reliance upon rate arbitration. As indicated above, the lawmakers expressed a preference for "reducing the administrative burdens on subscribers, cable operators, franchising authorities and the Commission" (Communications Act, Section 623(b)(2)(A), 47 U.S.C. Section 543(b)(2)(A)). This objective can be achieved through arbitration.

To facilitate the use of arbitration -- and other forms of alternative dispute resolution techniques such as mediation -- it is suggested that the Commission rule in this proceeding that ADR is an approach which the Commission encourages franchising authorities, cable operators and others to employ in the widest array of circumstances. At the very least, the Commission should

confirm that arbitration is acceptable practice in basic service rate cases.[2]

Further, it would seem that arbitration (ADR) should be encouraged at the very outset of the rate making process in order to introduce a neutral party at the earliest moment. One of the great advantages of arbitration, and ADR generally, is its flexibility. There is little reason not to employ it in all phases of a dispute.

LEASED ACCESS

One aspect of this proceeding requires further comment. At paragraph 170 of the NPRM, the Commission indicates that ADR is an appropriate means of resolving leased access conflicts. We agree.

The Commission also asks "whether parties should be permitted to seek resolution of leased access disputes by franchising authorities" and, further, whether such an option should be "voluntary" or "required". Our view is that ADR is clearly a valuable tool in settling leased access disputes. At the same time, the franchising authority is an unlikely choice for arbiter (or arbitrator), whether or not the franchising authority is a party to the dispute in question. The goal -- and principal advantage -- of ADR is speedy, efficient resolution by a neutral third party. The objective is to take the "politics" out of what are essentially business disputes. It is more likely

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[2] ADR may be equally appropriate with respect to disputes over leased access, the "unreasonableness" of charges for programming services, equipment charges, etc.

that these objectives will be achieved by non-government entities and, for that reason, we suggest that franchising authorities not be designated to resolve leased access disputes.

ADVANTAGES OF ARBITRATION

Some of the important advantages of rate arbitration are these: First, it takes nearly all of the political posturing out of what otherwise is usually a highly charged, media-involved process. The interested parties are given the opportunity to present their cases, but the deciding party is a neutral body. The atmosphere is far less charged and the decision far more businesslike than in traditional cable rate cases.

Second, neutral-party dispute resolution tends to be less costly and time consuming than administrative proceedings. The parties select representatives who present their economic cases, freeing government and cable executives to go about the business of governing and running their companies. Cities and cable operators can minimize costs, wasted time and the need for "spin" controllers, lobbyists, charges and countercharges.

Most important, rate arbitration may help move us to the future instead of returning us to the past. Cable industry executives and government officials may devote their energies and resources to the more important telecommunications issues of the '90's -- such as compression, fiber, video-on-demand and

alternate access -- rather than returning to the days of rancor and public bickering of the past.

Respectfully submitted,

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